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CITATIONS

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CITATIONS—(Continued)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-Defendant With Wallis)

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF WALLIS.

May It Please the Court:

Wallis has received the briefs on behalf of Respondents and desires to reply thereto. However, before doing so, Wallis would like to comment briefly upon this Court's recent decision (January 17, 1966) in *U. S. v. Yazell*, No. 10 (October Term, 1965), and, the memorandum of the Solicitor General, both of which occurred after the filing of Wallis' original brief.

I.

THE YAZELL CASE

In Wallis' petition for certiorari, we pointed out that despite this Court's decision in *U. S. v. Standard Oil Co.*, 332 U.S. 301 (1947), where the jurisprudence relative to the applicability of Federal law was reviewed and clarified, nevertheless there was continuing confusion, and the subject required further consideration and clarification. Fortunately this has been done in *Yazell*, and, therefore, no prior decision of this Court (or any of the plethora of commentaries), should be considered except in the light of *Yazell*.

First and foremost, this Court pointed out that "generalities as to the paramountcy of the federal interest do not lead inevitably" to the overriding of state law.

Second, this Court held that a contract (the subject matter of which relates to that which derives from a Federal statute) is still controlled by local law, absent **"direct legislation** or by appropriate authorization to an administrative agency **coupled with suitable implementing action by the agency,"**—this even in the instance, like Yazell, where the United States was a party to the contract.*

Third, this Court pointed out that there is no decision of this Court, where it "has devised and applied a federal principle of law superseding state law (which) involved an issue arising from **an individually negotiated contract."**

Fourth, there is no case by this Court, where it has devised and applied overriding Federal law to impose and enforce liability "on a person who, according to state law, was not competent to contract." In the case at bar, the

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* All emphasis herein is supplied, unless otherwise noted, and solely for the sake of brevity the Honorable Solicitor General is hereinafter referred to solely as "Solicitor."

asserted contracts are not **competent** contracts under local law.

Finally, *Yazell* held that: "Both theory and the precedents * * * teach (a) **solicitude for state interests,** * * *. They should be overridden by the federal courts **only** where **clear and substantial** interests of the national government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."

The controlling effect of these postulates are obvious and need no elaboration, as respects the issues here involved, particularly in light of the memo of the Solicitor. We point out, as respects the last pronouncement above noted, that the "state interests" under consideration were the "field of family and family-property arrangements," while the holding of the majority below is directed at overriding the local Statute of Frauds. In *Radio Station WOW v. Johnson*, 326 U.S. 120 (1944), this Court specifically recognized, as one such "state interest," the "State's power over fraud," as to which it held that "the principle of fair accommodation * * * should be observed." It is thus clear that the case at bar comes **squarely within** the above holding of the *Yazell* case. Therefore, this decisive question is presented by the case before the Court, to-wit: Will "clear and substantial interests of the national government * * * suffer major damage" as a result of the Trial Court's application of local law — the local Statute of Frauds — to the private contract here involved?

The quickest, and clearest, and most direct answer is a resounding "NO!", found in the memorandum filed by the Solicitor. But an even more decisive "NO!" is found in the answer to a further question, viz: What has been the result of almost 45 years of actual experience under

the Leasing Act? Again the Solicitor tells us (citing Land Department decisions) that it has been the administrative practice of the Secretary, (a) to apply local law to undisputed transactions involving transfers of Federal leases; and (b) to relegate disputed matters to local law and local forums. Wallis has cited an unbroken line of cases (by both the Land Department and the courts) showing that they have consistently applied **local law** to such matters. Where then has any "interest" of the national government suffered "damage," during this period, much less "damage" to "clear and substantial * * * interests"? Where is the evidence of such "damage"? Respondents point to no such evidence. But more important still, the majority below could not, and did not, **point to one scintilla of damage.** The majority below concluded (R. 113) that: " * * * there is a sufficient federal interest for the substantive independence of the federal court," and that "the interest of the United States is directly affected." But without pausing to question these conclusions, we point out that *Yazell*, **requires in addition,** that such "interests" (assuming they be "clear and substantial") "SUFFER MAJOR DAMAGE." Far from showing where such "interests" have suffered or might suffer "damage," as a result of Judge Wright's decision herein, all the majority below could say (R. 114) was:

> "We do not think the use [in the Leasing Act] of these devices [i.e. "assignments" and "options"] as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, **which are not present in the other states."**

This is the extent to which the majority attempted to show "damage," **which is absolutely no showing whatsoever.** And it should be noted, that while the majority concluded "uniformity" was necessary, yet the foregoing state-

ment shows that objection **was not** made merely to local interstitial restrictions, but only those "not present in the other states," and thus the majority conclusively demonstrates that state imposed interstitial restrictions, are not, per se, harmful or damaging, for **it only objects** to those "not present in other states." And in its haste to override the Trial Court's application of the local Statute of Frauds, the Court **only assumed** that it was an "interstitial restriction" peculiar to Louisiana and "not present in other states." It did not even consider this precise question but only assumed it, even in the face of the citation to it of the decision by the Tenth Circuit in *Whelan v. New Mexico Western Oil & Gas Co.*, 226 F. 2d 156 (1955), which specifically applied the New Mexico Statute of Frauds, to an asserted interest in Federal Oil and gas leases, and in denying such asserted interest, the Court said, page 160:

> " * * * There is no legislatively enacted domestic statute of frauds in New Mexico. The English statute of frauds is in force and effect in that state as a part of the common law."[1]

The foregoing discloses a total lack of any demonstration of "damage" to any Federal interest, and *Yazell* is controlling of the issues here involved.

II.

AMICUS CURIAE MEMO OF THE UNITED STATES

In granting the writ, this Court invited the Solicitor General to express the views of the United States (R. 134). The response to this invitation unreservedly and without

[1] The Fifth Circuit in *Hamilton v. Glassell*, 57 F. 2d 1032, compared the Statute of Frauds of Louisiana with that of Texas, saying (p. 1033): "The Texas statute of frauds is worded like the English statute in defining its operation: * * * (and at p. 1034) We apply it (the Louisiana statute) the more readily since the same results would be reached under the law of Texas if the case had been brought there."

qualification supports the position of Wallis, the decision of District Judge Wright and that of dissenting Circuit Judge Wisdom. At the same time it demonstrates the error of the decision of the majority below. This it does, both as respects the analysis of the Mineral Leasing Act, as well as the repeated conclusions that the United States has no interest in this controversy between these private individuals. It conclusively demonstrates that the issues between these private individuals—under the scheme of the Leasing Act, is and properly should be, governed by **local law.** As Wallis has shown, the Solicitor's analysis and conclusions are entirely in accord: (1) with the interpretative administrative application of the Act by the Secretary, and (2) with the unbroken jurisprudence (except for the divided decision below) of the Courts, during the forty-odd years since the passage of the Leasing Act.

Specifically, and in addition to the foregoing, the Solicitor's response discloses the following: (1) there is no claim here of a violation of federal statute, regulation or order, and, the validity of the lease, as vested in Wallis, is not questioned,[2] pp. 7-8; (2) applicability of local law herein **will not** undermine any federal interest or policy, p. 8; (3) the case of *Irvine v. Marshall*, 61 U.S. (20 How.) 558, is inapplicable, p. 8; (4) the Secretary **has not** been empowered by Congress to **compel** assignments [or subleases], and he may **disapprove** an assignment or sublease **only** for two statutory reasons, pp. 9, 11; (5) applicability of local law herein will not undermine the Secretary's regulatory authority under the Act, p. 10; (6) the extent of the interest of the United States is in seeing that the leased property is exploited only by qualified persons in accordance with the provisions of the lease, and this interest will not be affected by this private litigation or the

[2] This conclusion brings these cases precisely within the rule of Yazell.

applicability of local law thereto, p. 10; (7) if Wallis prevails herein, the status of the lease is unaffected. Conversely, if respondents prevail, yet they obtain no rights **unless** the Secretary approves respondents' **capacity** to hold the lease, or an interest therein, thereby approving the transfer to respondents. Thus the interests of the United States are fully protected—it has no interest in the outcome of this suit or the law applied herein, pp. 10, 11; and (8) the Secretary's power over private agreements is directed at preventing control of leases by persons lacking the requisite qualification, and this power is not impaired by the applicability of local law to such private transactions, p. 12.

In short, the Solicitor's analysis of the Act discloses that as between the parties to these private transactions the **substantive effect** of an assignment or sublease—**as a contract,** is governed and controlled by local law. That **as a contract** in accordance with local law, its **operative** effect as respects the title to the lease, is suspended by, or contingent upon, the approval of the Secretary as required by Sec. 30 of the Act. Such required approval is based **solely** [Sec. 30(a)] upon the **capacity** of the assignee or sublessee **to take under the contract,** i.e. (1) does the assignee or sublessee come within the acreage limitation on permissible holdings, and, (2) has he furnished sufficient bond? All subject to **the obligation imposed** by the Leasing Act [Sec. 30(a)] that regardless of the terms and conditions of the contract, the assignee or sublessee **automatically becomes bound** by the lease obligations in favor of the United States, upon such approval, and, it is only as respects these obligations so imposed and automatically assumed, that Federal law applies.

III.

BRIEF FOR PATRICK A. McKENNA

The brief by Respondent McKenna can best be characterized as an effort to avoid the issues presented, while injecting irrelevant issues. Where the brief touches the periphery of the issues presented, it ignores authorities cited by Wallis and the arguments in connection therewith.

A.

McKenna's Statement Of The Case

McKenna opens his statement of the case by describing the relationship between him and Wallis, as that of "joint venture." While it is true that McKenna **alleged** in his complaint (R. 2) as a conclusion, that there was a "joint venture," yet his complaint further shows (R. 7, Art. IX) that this conclusion was **predicated** upon the letter agreement of December 27, 1954 (Exhibit A, R. 8), for he there alleged: " * * * Plaintiff contends that by virtue of the contrary contentions concerning the plaintiff's interest in Federal Lease BLM 042017, **as a result of the agreement between plaintiff and defendant, Wallis, dated December 27, 1954,** an actual and bona fide controversy exists between the plaintiff and the defendant, Wallis, as to whether or not the plaintiff has an undivided one-third (1/3) interest in Public Land Lease BLM 042017 covering the lands comprising 826.87 acres in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana, **and the rights of plaintiff and defendant, Wallis, under the aforesaid agreement, dated December 27, 1954,** can be determined only by declaratory judgment * * *." Wallis denied there was a "joint venture," asserting that McKenna was his "agent" or "employee" (Art. 20, R. 18). The Trial Court did not deem it necessary to decide this issue, saying: "In view of the disposi-

tion here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest * * *" (R. 67, fn. 4), while at the same time the Trial Court held (R. 73) that the December 27, 1954 letter agreement: "* * * taken alone or illumined by parol evidence, **limit(s)** the claims of McKenna * * * to the acquired lands applications." Thus it is totally incorrect for McKenna to represent the relationship as that of "joint venture."

At page 3, McKenna refers to the execution of the option agreement by Wallis with Pan American (Exhibit P-1, R. 40) and complains that: "McKenna was not advised of this agreement until the issuance of the lease * * *." Yet here again, the Trial Court held: "No question is raised as to Wallis' authority to **contract alone** with respect to such a lease in view of the stipulation in his agreement with McKenna that 'all dealings in connection with these leases shall be at [Wallis'] **sole** discretion and direction.'" (R. 67, fn. 5).

The foregoing are the more glaring distortions contained in McKenna's "Statement."

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There is no need to consider McKenna's "Summary Of Argument" (pp. 7-8) for we will proceed to examine the argument itself; and in doing so, our refutation will follow McKenna's subheadings.

1. ***Stare Decisis and the "Rule of Property" Demand (Application of Federal Law), McKenna, pp. 5-14.***

On page 5, McKenna states that the lands so leased by Wallis "according to the Department of the Interior, were

never within the physical confines of the State of Louisiana, and the jurisprudence of that state never attached." As a predicate for this statement, McKenna refers to the "opinion of June 7, 1956 (R. 83), (of) the Department of the Interior," which he states (fn. 6) the Court of Appeal quoted at R. 83-86. This, of course, is not true, for the opinion only quotes an extract from the Department's opinion.[3]

This absurd contention which McKenna now presents to the Court, should be contrasted with what McKenna stated to this Court in his opposition to the petition for certiorari where, in describing his agreement with Wallis, he said, p. 2: "An Agreement was reached, involving a certain tract of federal land **in Plaquemines Parish, Louisiana,** which provided * * * ".[4] This same contention was asserted in the Court of Appeal and expressly rejected, for the majority opinion below, in referring to the subject matter of the suit (R. 78) stated that the lease in question covered "826.27 acres of exceedingly rich 'mud lumps' at the mouth of the Mississippi River, in Plaquemines Parish, Louisiana." Furthermore, the very lease in question, which was issued and **approved** by the Department (and specifically upheld by the Director in his opinion of June 7, 1956), expressly described the property as being **located**

[3] It is our understanding that the opinion is not reported, but is available to this Court through the Department of Interior. However, for the convenience of the court, we are filing with the Clerk a copy of the decision in its entirety. As the court will observe, the extract quoted by the Court of Appeal discloses on its face that it was speaking of the situation which prevailed *prior* to the passage of the Submerged Lands Act in 1953. Furthermore, the extract quoted by the court below, followed a section of the Director's opinion, wherein he considered the Submerged Lands Act, and therein he said: "The third grant of lands *within this area* is the Submerged Lands Act * * * "

[4] In making his absurd contention McKenna would ignore the allegations of his own complaint, where he alleged (R. 2) in Article III, that the lands covered by the five acquired lands applications covered "in the aggregate 826.27 acres of land in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana", and, in Article IV (R.3), where he alleged the application for the lease BLM 042017 was prepared "covering the same lands."

in Plaquemines Parish, Louisiana (R. 57), and the particular description of the property on Exhibit A to the lease (R. 59) commences with this statement:

> "Exhibit A—The land requested is unsurveyed and is **located in Plaquemines Parish, Louisiana** * * *."

This contention of McKenna, is entirely specious.

On pages 6-9, McKenna cites the cases of *Wilcox v. Jackson*, 38 U.S. (13 Peters) 498 (1839), *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871), *Massie v. Watts*, 10 U.S. (6 Cranch.) 148 (1810), *Bagnell et al v. Broderick*, 38 U.S. (13 Pet.) 436 (1839), and *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1856). Before discussing these cases in detail, we point out that McKenna, in citing these cases, completely fails to take note of certain well-recognized distinctions which render these cases inapplicable to the issues here involved, and, he further ignores later decisions by this Court, which decisions completely refute the interpretation McKenna would attempt to place upon the above cited cases. Furthermore, it should be noted that these are the cases cited and relied upon, in the main, by the majority below in its original opinion (R. 78). Yet the majority below (we submit) was forced to abandon that opinion (and such authorities) when, on rehearing, it said (R. 108): "We have concluded that our decision should be more closely tied to that [Mineral Leasing] Act," and then the Court proceeded to recognize the doctrine of *Johnson v. Towsley*, 80 U.S. 72 (1871), *Rector v. Gibbon*, 111 U.S. 276, *Marquez v. Frisbie*, 101 U.S. 473 (1879), *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, *Steel v. St. Louis Smelting and Refining Co.*, 106 U.S. 447, *Bohall v. Dilla*, 114 U.S. 47 (1884),[5] all to the effect that a Federal court of equity has no jurisdiction or power to impose an equitable trust upon a "legal title" issued by

[5] C'ted and discussed at page 48, et seq. of Wallis' Brief.

the Land Department, unless the party asserting the equities, derived those equities from dealings had with the Land Department.[6] The rule as announced in *Bohall* (p. 50) is as follows: "We do not think the claim of the defendant to the **equitable relief** he seeks can be sustained on the grounds stated in his answer or cross-complaint. **To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title,** the claimant must present such a case as will show that **he himself was entitled to the patent from the Government,** and that, in consequence of erroneous rulings of the officers of **the Land Department upon the law applicable to the facts found, it was refused to him.** It is not sufficient to show that there may have been error in adjudging the title to the patentee. **It must appear that by the law properly administered the title should have been awarded to the claimant** * * *." When faced with this pronouncement, the majority completed its abandonment of its first opinion when it said (R. 108-109): "It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary * * *. If these actions were those of 'competing claimants,' the Secretary's decision would be subject to judicial review **only** if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes 'public lands' was erroneous as a matter of law. E.g., *Morgan v. Udall*, D.C. Cir. 1962, 306 F. 2d 799."

Aside from the foregoing, the principal distinction which McKenna fails to note, is the fact that while a local

[6] The doctrine of these cases was specifically applied to a Federal oil and gas lease in *Hodgson v. Federal Oil & Development Co.*, 247 U.S. 15 (1927), cited and discussed in Wallis' Brief, at pages 57, et seq., cf. particularly page 59, fn. 60.

statute may not operate **directly** upon the **title** to Federal lands or rights therein or thereto, nor may it purport to vest same, yet local law may and does regulate and govern **contracts between private individuals,** even though the contracts themselves purport to relate to such lands or interests therein, so long as the application of local law to such contracts, does not render the "legal title" a nullity when it is issued by the Land Department. Cf. *Marquez v. Frisbie, supra.* Thus local law does not operate **directly** upon the land or title thereto, but only upon the contract.

Further, McKenna ignores and refuses to recognize, that the Land Department has granted Wallis the legal title to a lease, although at page 13 he is willing to speak of "McKenna's interest in the lease." Yet (as noted at page 23 of Wallis' Brief), the Land Department has consistently interpreted the Leasing Act, to the effect, that a Federal lease vests the lessee "with a property right and estate for years in real property," "an immediate leasehold interest,"—"an interest in the land."[7] Finally, McKenna would ignore the fact that this case is not concerned with the **power** of Congress (or the United States) to dispose of Federal lands, nor, is it concerned with the **disposition** of Federal lands or leases by the United States. We are here concerned **only** with a Federal oil and gas lease, and the United States **disposed** of said lease to Wallis.

As respects the extract quoted at page 6 from *Wilcox v. Jackson, supra,* we approve thereto, and, in fact, Wallis cited it in his brief. Here the **title to the lease** has been granted by the United States to Wallis, and such title, having passed to him, "like all other property in the state, is subject to the state legislation." This extract from *Wilcox,* was quoted by the majority below, and it followed (R. 80)

[7] In Wallis' Brief, at page 56, et seq., we noted and discussed the decisions of this Court and the Courts of Appeal to the same effect.

with this conclusion: "Subsequent decisions have made it clear that 'title' as used in that principle includes **not only the legal title, but also the equitable title,** indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was **in part for the benefit** of McKenna or of Pan American, or of both, are questions to be determined by federal law." The patent error in this conclusion, is conclusively demonstrated by the extract above quoted from *Bohall v. Dilla*, that the only "equitable rights" which a federal court may take cognizance of, are those which originate with dealings had with the Land Department. Hence, when the rule of *Wilcox* is considered in light of Bohall, it is quite apparent that when the lease issued to Wallis, it became "subject to the state legislation," "like all other property in the state."

Gibson v. Chouteau, supra, was a case where a state statute attempted to operate **directly** upon the title to Federal land, and stands for the simple proposition that adverse possession based upon a state statute of limitations, cannot operate to divest the United States of title to its lands. It was **not** a case of local law operating upon or governing a private contract made with one who had **acquired** a right or title from the United States. When the decision in *Gibson* is examined in detail, it will be seen that rather than supporting the majority opinion below, in actuality, it supports the position of Wallis, when it is considered in light of its first submission to the Court, as reported at 75 U.S. (8 Wall.) 314. This was not a case of a private contract or transaction between private parties, which purported to relate to such public lands. Clearly, a state statute alone cannot give a person an inceptive claim or title to land when coupled only with adverse possession, where the legal title to such land is in the United States.

Massie v. Watts, supra, is absolutely irrelevant to the

issue here involved, and, in fact, has absolutely no relevancy to the position which McKenna is attempting to maintain. This fact demonstrates the error of the Court in *Irvine v. Marshall, supra*, which cited and relied upon *Massie*. For in *Massie*, (1) the Court was not concerned with any question of applicable federal law, as respects federal lands, for the lands involved in *Massie* were lands which the State of Virginia had owned, and, in turn, had disposed of; (2) the Court was **only** concerned with **its equitable jurisdiction**, from the standpoint of whether a federal court could render an *in personam* judgment requiring a conveyance of land, which was situated **outside** the jurisdiction of such court, and, **we repeat**, there was absolutely no question of federal law applying to the "title" question involved, and (3) the Court was solely concerned with **conflicting grants** of land by the State of Virginia, and **it therefore was impossible** for it to have been dealing with a situation where the legal title was still in the Land Department, for the United States **never** owned the land!

The case of *Bagnell, et al v. Broderick, supra*, is not applicable here, for the "equitable rights" involved in that case were derived from dealings had with the officials of the Land Department. Thus **both parties** were claiming under conflicting locations for the same property. The defendant had possession of the property, but the location under which the plaintiff claimed had already proceeded to patent. The suit was an **action at law** for ejectment, and the lower court held for the plaintiff, ruling that in an action at law, a patent was conclusive and must prevail. In affirming, the Court held that a mere "notice of location" under which the defendant held, was not sufficient under Federal land laws to constitute an "appropriation" of the land, since it was not followed by "the plat and certificate of survey, returned to the recorder of land-titles." Such being necessary for an "appropriation" under Fed-

eral land laws, local law could not make a mere "notice of location" operate as an "appropriation." And particularly, it could not make it equal to, or prevail over, a patent, which by the land laws was conclusive evidence of title. As respects any claims which the defendant might have under his "location," and particularly the "equities" in connection therewith, the Court said that if he could show the patent issued by "mistake" of the land officials, "then the equity side of the circuit court is the proper forum, and a bill the proper remedy, to investigate the equities of the parties." There is nothing in this case, which is relevant to the questions here involved.

As respects the case of *Irvine v. Marshall and Barton, supra*, Wallis discussed this decision in his brief in the context of later decisions, and demonstrated its inapplicability at pages 51 and 52 thereof, and, the Solicitor's Memorandum at page 8 also demonstrates its inappropriateness. McKenna, at page 10, states that Wallis attempts to distinguish *Irvine* "on two bases: First, that title had not passed from the United States; and second, that the cause of action did not accrue until Wallis' refusal to convey." This is a complete distortion of Wallis' distinguishment of that case, and a complete disregard of the full thrust of Wallis' position in this respect. At no time has Wallis argued that his "refusal to convey" has any relevancy to or connection with the *Irvine* case. As respects the fact that in the *Irvine* case, "title had not passed from the United States," Wallis' position is that the local statute involved in *Irvine*, as the Court interpreted it, was not a mere Statute of Frauds regulating a private contract, but was a statute which attempted to **vest title** irrevocably, for it provided (as quoted by McKenna, top of page 8) that "the **title** and possession shall **vest exclusively** in the **person named** as the alienee in such conveyance or agreement." Clearly, this a local statute cannot do, where the

title to the property is still in the United States, and, necessarily, it could not control the officials of the Land Department when they came to dispose of the "legal title" thereto, nor render that "title" a nullity when issued. This is the purport of the extract quoted by McKenna at the bottom of page 8, where the Court answered the question posed by it, concerning the power of the Territory "to impose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed?" But this question is not involved in the case at bar, for here the United States **has disposed** of the lease to Wallis, and there is only a question of the law applicable to private contracts had with Wallis. Local law as here applied by the Trial Court has not said how or to whom the Land Department disposed of the lease, but local law gives full recognition to the Land Department's disposition thereof.

The *Irvine* case, at page 561 (61 U.S.) makes this statement: "The position asserted by the Court of Minnesota, **in interpreting their Statute,** must be understood **as broadly as it has just been stated,** OR IT HAS NO APPLICATION TO THE CASE BEFORE US * * *." We are forced to ask the precise meaning of this statement by the Court? It is quite obvious from a reading of the decision, that the Court concluded that the statute had been interpreted by the Courts of Minnesota as applying to the "title" of the property, while that title was still vested in the United States. We reiterate, that subsequent decisions by this Court, cited and discussed by Wallis in his brief, place *Irvine* in proper focus, and that it has no application to the case at bar, cf. *Marquez v. Frisbie, supra.*

At page 9, McKenna quotes an extract from the original majority opinion, to the effect that "as to the original patent, lease or other grant from the United States, fed-

eral law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests." The numerous authorities cited by the majority in support of this conclusion provide absolutely no basis therefor.[8] Nor do these authorities support the majority's interpretation of the *Irvine* case. In making this statement and citing these authorities, the majority (1) failed to make a distinction between a local statute which purports to **directly** affect title to public lands and a statute that affects a private contract, and (2) it failed to observe the limited area wherein a Federal Court of equity might apply Federal law to impose an equitable trust on a "legal title" issued by the United States, as delineated in *Johnson v. Towsley, supra*, and the cases following the doctrine of that case. Such cases require that the asserted "equities" originate with dealings had with the Land Department. As above noted, the majority abandoned this position, when faced with the rule as announced in *Bohall v. Dilla, supra.*

On page 9, McKenna cites the Louisiana decision in *Kittridge v. Breaud*, 4 Rob. 79, 39 Am. Dec. 512 (1843), as though it were applicable to the case at bar, and, as though the Trial Court had apparently erred in failing to follow it. The facts show that it was a suit involving conflicting rights **acquired** by both parties under the **Federal Land Laws**, to the same property. Whereas the patent had issued to the defendant, the facts disclose that the plaintiff's ancestors-in-title were entitled, under the appropriate Act of Congress, to acquire the land, and that they had taken all steps necessary under the statute to acquire same, including the payment therefor. The only

[8] Before the Court of Appeal, on application for rehearing, Wallis laboriously examined these authorities in detail. Because the majority abandoned this position in its second opinion, we will not burden this brief, at this point, with a repetition of this analysis. However, such an analysis has been annexed to this brief, *infra*, p. 49, as Annex "A."

reason they had not received adequate title thereto, was due to the failure of the U. S. Surveyor to show the claim upon the township plat, when he surveyed the township. The Court noted that, in Louisiana courts, no distinction existed between the law "side" and equity "side" of the court. It proceeded to examine the "equities" of the plaintiff originating in dealings had with the Land Department, and concluded that under the Federal Land Laws, the plaintiff's claim to the land was superior to, and originated prior to, those of the defendant. Hence **under Federal law** the plaintiff should prevail. This is simply a case of a State court's applying Federal law, and recognizing rights acquired under Federal law, all in accordance with Federal law. It is a classic example of the cases following *Johnson v. Towsley*, *supra*, and *Bohall v. Dilla*, *supra*, and is in no way analogous to the case at bar.

At the bottom of page 10, McKenna quotes an extract from *Boesche v. Udall*, and this he does in complete disregard of the fact (1) that this Court expressly circumscribed the effect of the holding in that case, (2) that the Court was speaking in a context contemplating the jurisdiction of the Secretary of the Interior **solely** from the standpoint of his authority to cancel a lease issued by him, and, for a pre-lease error in administration, (3) that the Secretary was a party involved, and a party at interest, and (4) that as respects disputes between private individuals, involving "rights" to public lands, where the "legal title" remains vested in the United States, the policy of Congress has been to leave the parties to local law and local forums.[9] These are matters which McKenna completely ignores.

At the top of page 11 to the middle of 14, McKenna

[9] The memo of the Solicitor shows that this has been the policy followed by the Secretary, in his administrative interpretation, and, application of the Leasing Act, since the inception thereof.

presents an analysis of the Leasing Act, and arrives at certain conclusions, about which we make these observations, viz: (1) The conclusions are contrary to those of the Solicitor, who likewise analyzed the Act and demonstrated that the matters here involved are completely beyond the legislative scheme, and, ambit of the Act; (2) McKenna's analysis of the Act, forces him to concede: (a) there is no specific provision of the Act which is applicable, and (b) there is not involved any rule or regulation of the Secretary of Interior or other implementing action of his agency, the Land Department—all as the Solicitor noted; (3) In the final analysis, McKenna resorts to the rhetorical arguments of "comprehensiveness," "overriding federal interests" and "uniformity," which alone mean nothing, for as this Court said in *Yazell*, **"generalities** as to the paramountcy of the federal interest do not lead inevitably to the" overriding of a state rule; (4) As has been pointed out by Wallis, and the Solicitor concurs,—we have had almost 45 years of **actual administrative application** of the Act by the Secretary, and, the same application by the Courts, all treating the matters such as here involved, as local, and subject to local law—thus 45 years when such matters have **not** received the "uniform treatment" contended for by Respondents. And we are forced to ask—what federal interest has suffered, and, do Respondents point to a single instance where any federal interest has suffered? Neither the majority nor respondents have so pointed. The Solicitor flatly stated there was no federal interest involved, and (5) As this Court stated in *Yazell:* "None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." We submit that when this is considered in light of this Court's decision in *Bank of America Trust & Savings Assn. v. Parnell*, 352 U.S. 29, it demonstrates con-

clusively that any rights which these Respondents might have, arise solely from contract, and are entirely devoid of any Federal flavor.

In *Yazell*, even as respects a contract to which the United States was a party, this Court rejected "out-of-hand," the contention that "the unlimited right of the Federal Government to choose the persons with whom it will contract" warranted the overriding of local law. These Respondents occupy a **more remote** position, as respects such a contention, yet at the top of page 11 McKenna so contends, when he says that the Leasing Act "is entirely federal in scope and can in no way tolerate the interdiction by state law as to who can or cannot, or who may or may not, qualify to participate in an interest in the leasehold." But even in making this statement, McKenna never points out wherein, as respects this litigation, local law would so operate to the detriment of the Federal interest. Here McKenna has sued Wallis, a resident of Louisiana, asking that Wallis be required to recognize that he, McKenna, has an interest in a lease which he admits the United States properly issued to Wallis. McKenna does not predicate his suit on any provision of the Leasing Act, or regulation thereunder, but he predicates it **solely** upon a private contract with Wallis. He does not point to a single "right" which the Leasing Act granted him, and which has been denied. With the lease vested in Wallis, McKenna could only acquire a "right" thereto, with the consent of Wallis, the owner, and then only by a valid contract evidencing Wallis' consent. It is only as respects the question of whether the private contract so validly evidences Wallis' consent, that local law has spoken. As respects any "right" concerning a transfer of the lease, the sole grant by the Leasing Act is the privilege in favor of Wallis, as lessee, that he may assign or sublease. But this does not grant McKenna any "right," particularly a

"right" to acquire, for McKenna could only derive a "right" to acquire from Wallis, and, not from any provision of the Act. Thus local law has not interdicted, denied, or negatived any provision of the Leasing Act, for all that it has done, is determine whether or not Wallis had evidenced his "consent" that McKenna so acquire, by executing a valid contract.

Hence when McKenna concludes, p. 13, that "the fee interest in the lands covered by the lease remains in the federal government whose involvement in the lease is continuing from its issuance until its termination or abandonment," he speaks of matters which involve **solely** and **only** the Federal Government, and which are of sole concern to it, and if any such matters were here involved (the Solicitor says they are not), the Secretary would be the proper party to assert and protect those interests. But in the final analysis the Congress has provided the precise extent and manner in which, and how, such Federal interests are to be protected, by enacting Sec. 30 and Sec. 30(a) of the Act. Additionally, Congress has conferred authority upon the Secretary to supplement these Sections by appropriate regulations. Thus there is no nexus justifying McKenna's a *fortiori* conclusion, that his "interest in the lease must be determined by federal law."

At the bottom of page 13, McKenna argues "the rule of property," and as will be noted, Wallis, in his brief, also argued for "the stability of titles." Thus there is no disagreement on the desirability thereof. Wallis has examined at great length, that which McKenna advances as a "rule of property," and demonstrated wherein it has no applicability to the facts of this case. On the other hand, McKenna nowhere assumes to even examine that which Wallis advances as a "rule of property,"—that which the Solicitor agrees is the applicable rule.

2. ***Uniformity Demands (Application Of Federal Law), McKenna pp. 14-21.***

Under the guise of "uniformity" McKenna would here attempt to argue that which was characterized in *Yazell* as "paramountcy of the federal interest," and at page 15 this statement appears: "Allowing the interstices of such a program to be filled by the variables and contradictions which may, and oftentimes do, characterize the policies and procedures when moving from one state to the next may threaten the free flow of implementation which thus far has proved a marked success * * * ." We leave to this Court the task of attributing any responsible meaning to the totality of this jumble of words, while we only cope with the last phrase thereof, which indicates that up to the present time, something (which we assume to be the operation of the leasing program) "thus far has proved a marked success." And in this connection, we can only reiterate, that as respects matters such as those here involved, the Secretary in his administration, and, application of the Act (since its inception to date), has relegated these matters to local law, and, the Courts in applying the Act have also followed local law. All of this, McKenna concedes, has resulted in a "marked success,"—thus clearly refuting his argument that his "uniformity" is "demanded."

At the middle of page 16, McKenna, in different words, again reiterates his argument that appears at the top of page 11 dealing with the word "qualify"—and we there disposed of it. However, we add this one further thought, viz: McKenna speaks of "the form of one's agreement did not qualify (him) to receive an interest" in the lease, because the "form of (the) agreement" did not meet the requirements of local law. Hence he asks this Court to fashion overriding Federal law, and thus make Wallis

liable to convey an interest in the lease to him. Yet *Yazell* says no case by this Court permits "federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract." We submit there is less reason to so enforce liability on Wallis (1) when local law says there is not even **a competent contract,** and (2) local law says even though there was the contract for which McKenna contends, yet local law, while affording an adequate remedy for the breach thereof, would not afford McKenna the remedy which he asks this Court to require (contrary to the remedy afforded by local law).

Sola (top of page 17) involved the **prohibition** of a Federal statute, which is not the case here, for both the majority below, and McKenna, conceded that the matter here involved is interstitial at the most.

At page 17 over to page 20, McKenna cites various cases, which he characterizes as "unrelated in their general facts," and he might have given even more bases for their distinguishment and inapplicability. But since this Court in *Yazell* stated that there was no case of this Court which "has devised and applied a federal principle of law superseding state law (which) involved an issue arising from an individually negotiated contract," and since the Solicitor's brief mentions the decisions which are relevant here, we do not deem it necessary to pursue these cases. We note, however, that of such cases, only *Francis v. Southern Pacific Co.*, 333 U.S. 445, was cited by the majority below, and Wallis dealt with that in his original brief.

The argument made in the first full paragraph on page 20, apparently prevailed in the celebrated case of *Swift v. Tyson*, and continued while that case was the law, but it was "laid to rest" by the equally celebrated case of *Erie R. Co. v. Tompkins*, and we do not believe the issues require us to point out why *Erie* is **not** "pure sophistry."

3. ***The Choice of Law Demands It, McKenna p. 21.***

This argument revolves around the Louisiana decision in *Kittridge v. Breaud, supra,* which we have heretofore examined in detail, and demonstrated that there the Court did not exercise any **power** of "choice of law." On the contrary, the Court was dealing with "rights" which the plaintiff had acquired by virtue of the Acts of Congress, and, therefore, **it had no** "choice," but was **required** to apply Federal law, and, in effect "sit" as a Federal court. Here the situation is reversed, for McKenna acquired no "rights" by virtue of any Federal statute, and under the doctrine of *Erie,* the Federal court is required to "sit" as a state court.

4. ***Justice Demands It, McKenna pp. 21-22.***

The content of this "argument" clearly demonstrates precisely what "justice" means to this Respondent. He boldly asks this Court to utterly disregard the law, and give him a judgment—not justice. This he advances in a Court of Equity, and even without pretense, or effort to demonstrate, that the laws which he asks this Court to disregard, would deny him the justice which he pretends to seek.

5. ***Naught To The Contrary Exists In Erie, McKenna pp. 22-23.***

Under this argument, McKenna asserts that the lands here involved "are part of the marginal sea," and, are "not in the confines of any state." We demonstrated the error of this statement at the outset. This "argument," stripped of pretense, is a request that this Court repudiate the Rules of Decision Act, and the decision in *Erie.* This is an argument for "forum-shopping" in reverse, in that

McKenna would ask this Court to do his "shopping" for him, by bringing (what he asserts to be) the law of the District of Columbia, to Louisiana, and directing that it be there dispensed.

Section B, McKenna's Brief, pp. 23-24.

This section of McKenna's brief is devoted to the type of decree which this Court should enter, in the event of reversal, and, since it is common to the argument in Pam Am's brief on the same subject, we will consider both arguments together, and, at the conclusion of a consideration of Pan Am's brief.

IV.

BRIEF FOR PAN AM

Before considering the content of Pan Am's brief, Wallis feels required to call the Court's attention, to the question of whether the brief conforms to the requirements of the Rules of this Court, particularly from the standpoint of the repeated instances where the brief goes beyond the Record.

While this matter was pending on petition for certiorari, and in his reply brief in connection therewith, Wallis said, at page 5: " * * * Accordingly, in preparing the petition for certiorari, and more particularly the 'Statement Of Case,' Wallis attempted to comply with the requirements of the Rules of this Court, and confine such statement to a recitation of such facts as would properly present the question presented for review. In doing so, Wallis attempted to confine the factual recitation to those factual matters decided and ruled upon by the Trial Court, avoiding factual issues not passed upon by the Trial Court, or, confining it to facts about which there was no dispute. While neither of the briefs in opposition makes any spe-

cific objection to Wallis' 'Statement Of Case,' yet both briefs purport to give a 'Statement Of Case.' * * * Neither of respondent's 'statement' suggest any inaccuracy in Wallis 'Statement,' and nothing contained in either such 'statement' supplies any 'omission' relevant to the questions presented for review * * *." In the light of the foregoing, and upon the granting of the writ, when it came time for Wallis to designate the record, he did so with the view in mind of employing the same "Statement of Case" as that in his petition, since it had not been challenged by Respondents. After the designation of the record by Wallis, and the service thereof upon Respondents, neither Respondent filed any cross-designation, and Rule 26, par. 2, of this Court's Rules provides that if a Respondent does not so cross-designate, "he shall be held to have consented to a hearing on a printed record consisting of those parts designated by the petitioner."

In giving the "Statement of Case" in his brief, Wallis was particular to follow that which was originally set forth in his petition for certiorari, modified only to comply with this Court's Rules. Despite the above quoted provision of Rule 26, and in complete disregard thereof, Pan Am commences its "Statement of Case" with this observation, footnote 3, page 3, to-wit: "In order that all pertinent facts involved are before the Court in light of Wallis' statement of case, references will be made to the **original record and Pan American's original exhibits** * * *." And then Pan Am proceeds to do just that, in utter **disregard of the printed Record.** Not being content with this flagrant disregard of the Rule, Pan Am even alludes to matters which it does not even pretend are part of the original record! In addition, the entire brief of Pan Am is permeated and replete from start to finish, with distorted statements and conclusions supposedly predicated on these matters which

are beyond the printed Record. All of which is, and was, done for the sole purpose of smearing Wallis with charges of "fraud and deceit," in the frantic hope that in some way Pan Am might prejudice Wallis' position before this Court. As sorely tempted as we are, to indulge in a "full-dress" point-by-point refutation of these unfounded charges, we recognize that this is neither the time nor place to do so. However, we have taken the liberty of preparing a refutation of these improper allegations by Pan Am which we annex to this brief as Annex B. Accordingly, if the Court is disposed to consider the numerous allegations of Pan Am, which are predicated upon matters beyond the printed record, we earnestly request the Court to do so in light of the refutation thereof contained in Annex B.

Pan Am's Opening Statement, pp. 1-3.

The matter here set forth relates to that covered by subsection 5, of Pan Am's brief, and, accordingly, we will consider these pages in conjunction therewith.

"Statement Of Case," by Pan Am. pp. 3-9.

As respects Pan Am's "statement of case," we rest upon what was said above, and more particularly, what we have said in refutation, as contained in Annex "B" *infra*. We ask, that to the extent the Court examines Pan Am's "statement", it do so, in light of the following statement of Judge Wright (R. 71) to-wit:

> "With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were execute!. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending ac-

quired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan American were both anxious to share in **any lease** Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interset in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties * * * ."

And then consider this statement of Judge Wright, in conjunction with the highly important and crucial proposition of law, the correctness of which **is acknowledged by all parties to this suit,** and the Solicitor concurs. We refer to the proposition of law, that as respects the two Leasing Acts which Congress has adopted, an application for a lease under one statute, absolutely cannot ripen into a lease, if the Land Department determines the character of the land to be such that the lands are governed by the other statute. From this, it necessarily follows, that it was absolutely impossible for Wallis to obtain a lease on the property in question, under his acquired lands applications, since the land was **in fact and in law** not "acquired lands" but "public domain lands," under the decision of the Land Department. The character of the land being "public domain," no matter what Wallis did, or did not do, in connection with his "acquired lands" applications, (1) it was impossible for him to acquire a lease thereunder, and (more important) (2) it was impossible for him to have received the lease BLM 042017, pursuant to such "acquired lands" applications.

1. ***"Federal Law Is Applicable," Pan Am, pp. 1-18.***

At the very outset of this argument, Pan Am, at the top of page 12, (1) acknowledges the rule that a Federal equity court has no "power" or jurisdiction (and thus no "duty") to impose "an equitable trust" upon a "legal title" issued by the Land Department, unless Pan Am can show that it "was entitled [thereto] from the Government," *Bohall v. Dilla, supra,* and (2) it further acknowledges the statement of the Solicitor, that the Leasing Act contains no provisions governing the private business relations of parties, as among themselves. Pan Am would attempt to evade the force and effect of these propositions, **not by questioning their soundness or correctness,** but by attempting to distinguish these propositions, along with the cited Land Department decision, by pointing to its unfounded charges of "fraud" and then asserting that such was "inceptive."

The Court will observe that in furtherance of its argument in this connection, Pan Am predicates same upon the **assumption** that Wallis was its "agent." That this assumption **is entirely fallacious,** doubtlessly explains why Pan Am **only concluded** that Wallis was its "agent," and **made no effort to demonstrate,** as a matter of law, that Wallis was in law and in fact its "agent."

That Wallis **was not** Pan Am's "agent," is easily demonstrated, by a few references to Volume 1, American Law Institute, "Restatement Of The Law, Agency," 2d Ed., to-wit:

> "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another person that the **other shall act on his behalf and subject to his control,** and consent by the other so to act." p. 7

It will be observed that Wallis had filed the "acquired lands" applications, and, was involved in the controversy with Morgan **long before** the option agreement with Pan Am. They were solely Wallis' applications, and, it was solely Wallis' controversy. In securing the lease, Wallis was acting **on his own behalf,** and, subject to **his own control,** for the lease was to be granted by the BLM to Wallis, not Pan Am, and Pan Am had no right thereto (under the agreement or otherwise) until Wallis secured the lease under his acquired lands applications, and then there was only an "option," with no assurance that Pan Am would even elect to exercise the option. We repeat, Wallis was **acting in his own behalf,** not in behalf of Pan Am, and, Wallis was **not** subject to Pan Am's control, and nowhere does Pan Am even presume to so assert that it had any different rights or control.[10]

The "Restatement" also has a section entitled "Agency Distinguished From Other Relations," and while there is no specific example of that of "optionor-optionee," there is one dealing with the relationship of "agent or supplier," and it provides (page 75):

> "§ 14 K. Agent or Supplier
> "One who contracts to acquire property from a third person and convey it to another is the agent of the other **only** if it is agreed that he is to act **primarily** for the benefit of the other and **not for himself.**
>
> "Comment:
> "a. Typical situations to which the rule stated in this Section apply are the purchase of shares in a

[10] Indeed, Pan Am stated to the Court below, that: "Pan American did in fact leave the exclusive handling of the applications to the discretion of Wallis to carry them to a conclusion as best he could . . . Wallis had such unrestricted discretion that Pan American never participated in any of the proceedings in the Bureau of Land Management . . ." p. 24, "Original Brief on Behalf of Pan American Petroleum Corporation," Fifth Circuit Court of Appeals.

> corporation through a dealer or the purchase of land through a broker. Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, **and not acting as agent for,** the other are: (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. **This is the most important.** (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property. None of these factors is conclusive. The question arises in a variety of ways. Thus the issue may be whether or not the supplier is entitled to keep the difference between what he paid for the goods and what it was agreed he should receive from the transferee; if there is an agency, normally this amount must be accounted for. However, a principal may agree that his buying agent is to retain the amount. The issue may arise because of the Statute of Frauds, because an oral order to an agent is not within the Statute, whereas an oral order to a seller, if above the statutory amount, must be in writing. Comment *c* on Section 14 J states a number of other ways in which it may be important to determine whether a transaction creates a contract of sale or an agency relation."[11]

Applying this rule to Wallis and Pan Am, if Wallis is to be properly considered to have been Pan Am's agent, it requires the finding that: Wallis acted **primarily** for the **benefit** of Pan Am and **not** for Wallis. Since this was only an option, with the lease to be tendered by Wallis **only** after he secured it, and, then with the right of Pan Am to **elect at that time,** whether or not it would take the lease, how, then, can it be said that Wallis had agreed to act **primarily** for Pan Am, and, not for himself in the procurement of the lease? And particularly when Wallis was already en-

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[11]Comment *c* on Section 14 J referred to in the "Comment" is not relevant for it deals solely with the relationship of consignor-consignee.

gaged in securing the lease for **himself,** prior to the option agreement, and there is not one single provision in the agreement, showing that they **agreed** that **thereafter** he would not continue to so act, or, that he would act **primarily** for Pan Am. Pan Am did not employ or hire Wallis to secure the lease, if only **paid** Wallis for an **option** to acquire, once Wallis had secured a lease under the acquired lands applications. And it should be observed that Wallis was paying the cost and expenses for so securing the lease, **not** Pan Am.

The above quoted "comment" under the rule, first, gives illustrations of "brokers" as coming under the agency relationship, where the principal has **first** determined the property he desires to acquire, and then designates or agrees that the agent shall acquire it for him. This should **be constrasted** with the situation here involved. The "comment" then gives the **most important** factor in determining the relationship, and that (in the terms of this case) is whether Wallis was to receive a **fixed price** for the lease, **irrespective** of what he paid for it. The option agreement provides that Wallis **would receive a fixed price,** and the "comment" says this is a "sale" and **not** an "agency." As respects the other two factors which bear upon a determination of the relationship, when they are applied herein, the result also negatives the "agency" relationship.

The foregoing conclusively demonstrates that Wallis **was not** Pan Am's "agent," and we will proceed to examine Pan Am's argument in the light thereof.

Both the quotation from the Bible (page 13) and the case of *Massie v. Watts, supra,* and the two hypothets posed upon pp. 14-15 of Pan Am's brief, are predicated solely upon an agency relationship. There is absolutely no analogy between Wallis and Massie, as the above extract from

the Restatement clearly illustrates. And, of course, the argument in the full paragraph on page 15, is but a plea to this Court, **to give** Pan Am that, which in the words of Judge Wright, it did not "buy a share" of.

Pan Am's argument at the bottom of page 14 over to 15, including the case of *Irvine v. Marshall, supra*, duplicates McKenna's argument and we fully covered these, in considering McKenna's brief on this point.

In making the argument on page 16 to the middle of page 17, which includes the reference to *Lincoln Mills*, Pan Am proceeds on the assumption that there is fraud here involved, but, even in making this assumption, it is forced to concede (1) that a Federal court of equity has no power or jurisdiction (and thus no "duty") to grant the relief which Pan Am seeks, and, (2) it concedes that "the Mineral Leasing Act lacks an expressed statutory sanction" therefor. Having made these destructive concessions, Pan Am then attempts to analogize the situation to *Lincoln Mills*, with, of course, a failure to consider the factors which were involved in *Lincoln Mills*. Thus the court below conceded that the right of action which Pan Am asserts herein was created under local law, whereas in *Lincoln Mills* the right of action was created by Federal statute. The very admission by the court below that the right of action here involved was created by local law, necessarily conceded that the contract between the parties was authorized and provided for by local law, whereas the contract involved in *Lincoln Mills* was specifically provided for and authorized by Federal statute, and, this Court interpreted § 301(a) of the Act there involved, as authorizing "federal courts to fashion a body of federal law," rather than merely granting jurisdiction regardless of diversity of citizenship of the parties, saying: "Congress

has indicated by § 301(a) the purpose to follow that course here," i.e. for the Courts to "fashion federal law." Thus the Court in *Lincoln Mills* had to conclude, that the policy of the statute there involved, and that which the policy sought to accomplish, was so all prevading (along with the other factors above noted, particularly the above interpretation of § 301(a)) that Congress necessarily **intended** that the courts should fill the interstices of the Act. The *Yazell* case places *Lincoln Mills* in proper focus, as respects the situation here involved, when it recognizes, by strong inference, the serious constitutional question that lurks in the background, any time that this Court might undertake to "make law," as Pan Am would have the Court do herein.

Furthermore, as we pointed out in Wallis' original brief, the very provision of Section 32 of the Mineral Leasing Act (which provides that the Leasing Act should not be construed or held to affect the rights of the states to exercise any rights which they may have), necessarily indicates an intention on the part of Congress that the Courts should not "make law" under the guise of filling the interstices of the Leasing Act, particularly where to do so would affect the rights of the states in the exercise of the rights which the state has. And we submit that this clearly indicates the intention of Congress that the Act should not be construed to interfere with the state's disposition of a cause of action which admittedly arises under state law. But in any event, as the Solicitor acknowledges, the policy of the Secretary, who was designated by Congress to administer the Act, has been to leave these matters to local law and local forums and that, of itself, should be sufficient to reject Pan Am's insistence that this Court "make law."

Wallis does not question the "power" of the Courts

to "make law," **in a proper situation,** but the questions now before the Court are these (1) is this a situation where the Court has the "power" by inferring Congressional "intent," and (2) assuming such power generally as respects the Act, did Congress intend it to be exercised in this specific instance (a) in light of the administrative interpretation by the Secretary, (b) in light of Sec. 32 of the Act, and (c) in light of the addition of Sec. 30(a) to the Act? We say most certainly not.

The argument at the middle of page 17, to the end of this section, is, in the final analysis, but an appeal to this Court, that it do precisely what this Court refused to do in the *Yazell* case, where this Court refused, even when the United States was a party to the contract. Both Judge Wright and Judge Wisdom pointed out, that local law was adequate in every respect, to afford Pan Am any and all justice to which Pan Am is entitled. And while Pan Am would cry for "uniformity," it would ignore completely the fact that for 45 years, the "uniform" interpretation and application by the Secretary and the Courts, has been to the effect that the Leasing Act does not cover the matter, and Congress intended that local law and local forums should handle such matters.

2. *"The Mineral Leasing Act For Public Domain Land," Pan Am, pp. 18-29.*

At the outset of this section, Pan Am attempts to cope with Sec. 32 of the Act, citing and quoting cases dealing with provisions of various Reclamation and Irrigation laws. But if the Court will examine each of the cited provisions, and compare them with Sec. 32, it will immediately be seen that, while Sec. 32 is unrestricted in its scope, the statutory extracts cited by Pan Am are, in each instance, entirely restricted in application. In the *Ivanhoe*

case, the Court will perceive that § 8 of the Act there in question, was being advanced (1) in an effort to interdict the United States **itself** in "the operation of the project," and, (2) in the other instance, to render inapplicable an express provision of the Act, where the administrative interpretation was to the contrary, and Congress had ratified such interpretation. Wallis does not pretend, and would not contend, that Sec. 32 prohibits the Secretary from administering the leasing program, in accordance with the provisions of the Leasing Act, which would be the only **relevant** analogy to *Ivanhoe*, as respects the first proposition. As respects the second proposition, Pan Am is not pointing to any **section of the Leasing Act,** which it contends authorizes what it seeks before this Court, in fact it admits there is no such provision. But more important still, is the administrative interpretation of the Leasing Act, which has been entirely **opposed** to Pan Am's contention, in direct contrast to the situation in *Ivanhoe*. Thus *Ivanhoe* is inapplicable.

City of Fresno is obviously inapplicable, for here Wallis is not holding up § 32 in opposition to the exercise by the Government of any of its powers, nor (as in *Arizona*) to the action of any governmental official in pursuance of, or in the exercise of, any governmental power. A mere reading of the extracts from the *Iowa Hydro-Electric* case, discloses its complete irrelevancy.

In connection with these cases, it is our position that Sec. 32 evidences the intention of Congress that the Court is not to fill the interstices, or, in other words, where the cause of action is locally created (as the lower court acknowledged) Congress **did not intend** that the Court, by interstitial processes, should supersede local law in the adjudication of such locally created cause of action. These

cases cited by Pan Am do not meet the thrust of this proposition.

It will serve no useful purpose to examine, in detail, the cases cited on page 26 of the brief, for the *Yazell* case, and those cited in the Solicitor's memo, and in our original brief, encompass the pertinent controlling decisions of this Court. And there being controlling decisions of this Court, an examination of the cited commentaries (pp. 26-27) would be a waste of time.

At the bottom of page 27 and top of page 28, Pan Am seeks to cope with the fact that the State of Louisiana has never ceded jurisdiction over the property here involved. While it cites various cases, Pan Am does not undertake to examine the cases cited by Wallis in this connection, particularly the recent decision of *Paul v. U.S.*, 371 U.S. 245. This was a case where the State **had in fact** ceded jurisdiction, but nevertheless this Court held that locally enacted minimum prices for milk would control the sale of milk, **purchased upon a military reservation,** where the military was purchasing the milk for military consumption, and, in the same case, this Court held that the same local laws were superseded, **by regulations properly enacted under Federal law,** as to similar purchases of milk. Yet in the instance where the regulation was **not operative,** there could be no question but that local law was regulating the exercise of "the plenary power of the United States." The distinction in the two instances is the fact that in one there was **no** Congressional sanction, whereas in the other, **there was.** But most important, this Court did not supersede local law, by indulging in "judicial legislation," as Pan Am suggests (page 27) herein.

As respects the conclusion by Pan Am in the last paragraph of page 28, we are forced to ask, precisely what is the meaning and purpose of § 32 of the Leasing Act?

3. ***"Boesche v. Udall," Pan Am, pp. 29-32.***

We have fully considered *Boesche* in Wallis' brief, and no further comment is required. As respects *Udall v. Tallman*, 380 U.S. 1, that case involved matters before and in the Land Department, and the Court merely made a passing reference to *Boesche*, saying: "An oil and gas lease does not vest title to the **lands** in the lessee." We have made no such contention. What we do say is, that a lease grants a "right" or "interest" **in the lands** (at least as respects third persons), and not title **to the lands.** This has been the uniform interpretation of the Act by the Secretary, and, the Courts. This has also been the interpretation and application of the Public Land Laws, generally, as respects "inceptive rights," where the legal title **to the lands** is vested in the United States. We submit that a lessee does not enjoy a lesser status.

4. ***"Uniformity," Pan Am, pp. 32-37.***

Since Wallis cited and analyzed *Hodgson* in his brief, no further comment is required, except to note that Pan Am does not purport to consider the points for which *Hodgson* was cited.

As respects the paragraph on page 33 to 34, it can best be characterized (in the words of *Yazell)*, as "generalities of paramountcy of the federal interest." Pan Am cites no authority for the reference to "the government's admitted public policy against 'lease grabbing'," in fact Pan Am does not even explain the meaning of the term. Under the provisions of the Leasing Act, and regulations issued by the Secretary, the Secretary knows who the lessee is, when he **initially** issues the lease, and Sec. 30 of the Act provides that no sublease or assignment shall be **valid until** approved by the Secretary, hence the

Secretary knows the lessee **at all times**, and this very provision of Sec. 30 was enacted by Congress to absolutely **assure** that fact. When counsel speaks of "utter confusion" in the law of Louisiana, he is not being frank with the Court, for he well knows that regardless of what "confusion" may have existed in the past, **there is no longer confusion.** For the State Supreme Court definitely and finally resolved all questions, and this it did while these very cases were pending on appeal, and we refer to the decision of *Hayes v. Muller*, 245 La. 356, 374, 158 So.2d 191 (1963), which is cited and fully discussed by Judge Wisdom, in his second dissenting opinion. (R. 115, fn. 4). Finally, Pan Am refers to 43 C.F.R. 3128.1, which we shall proceed to discuss.

The Court will observe that Pan Am refers to § 3128.1 (being a regulation issued by the Secretary, pursuant to the Leasing Act) as being in direct conflict with the "parol evidence rule," and it will be noted that the Solicitor (p. 16) also refers to this "rule" in conjunction with the regulation. Actually, we believe that it is more proper (in each instance) to refer to the Statute of Frauds. It is our understanding that the "parol evidence rule" operates only in the instances where an attempt is made to enlarge upon a written agreement, but does not exclude parol evidence of the entire agreement. On the other hand, it is our appreciation that the Statute of Frauds excludes **all** parol evidence, where the agreement relates to the title to real property, or rights and interests therein or thereto, regardless of whether the agreement be entirely oral, or partially oral. With this explanation of our concept, we turn to a consideration of the Regulation in question.

There are several reasons why Pan Am can take no consolation from § 3128.1 of the Regulations. In the first place, the Regulation is not applicable in this instance, for

it had not been adopted by the Secretary, when this lease was granted. The effective date for the lease here in question was January 1, 1959 (R. 56), and the applicable Regulation **at that time** was 43 C.F.R. § 192.141, found in the 1954 revision of the Code. This Regulation speaks only in terms of "instruments," making no reference to oral agreements. It was not until June 6, 1959 that the Secretary promulgated, for the first time, (Circular 2019, 24 Fed. Reg. 4630) a Regulation that was, in substance, similar to what now appears in 43 C.F.R. (Supp. as of April 1, 1924) § 3128.1. This was approximately six months after the effective date of the Wallis lease; and, more important still, it was several years after the dates of the alleged agreements which respondents are herein asserting. Thus § 192.141 only required a lessee to disclose "instruments" which evidenced ownership of an interest in, or right to, a lease, and, this is in accordance with the provisions of the lease issued to Wallis which provides (R. 58) under sub-paragraph "(m) Assignment of oil and gas lease or interest," that the lessee "file for approval within 90 days from the date of final execution **any instrument of transfer** * * * , such **instrument** to take effect upon the final approval * * * ." Thus, we repeat, that neither the lease in question, nor the Regulation applicable thereto, required the filing of anything but **"instruments** of transfer," and neither made any requirement of disclosure as respects parol or oral agreements.

It is true, that the Solicitor alluded to the present day Regulation, but he was obviously speaking of conditions which now prevail, and, apparently through oversight, failed to note the significance of the date of this lease. But even were the present Regulation, § 3128.1 applicable to the Wallis lease, generally, nevertheless, it would have no bearing on this case. The first and most obvious rea-

son, is pointed out by the Solicitor in his brief (p. 16), where he notes that a lessee could not attempt to shield himself from disclosure of oral agreements to the Secretary, under the guise of pleading a local statute, such as the Statute of Frauds. Thus the policy of the Secretary, since the enactment of the Act, has been to leave the controversy over private disputes to local law and local forums, where, of course, the Statute of Frauds and other provisions of local law will determine whether a party does or does not have an enforceable contract, and thus an interest in a lease, as in the case at bar. Under these circumstances, there would be no conflict between this practice of the Secretary, and, § 3128.1. On the other hand, Regulation § 3128.1 is designed to force a disclosure of an oral agreement, in a situation where the lessee is willing to be bound by an oral agreement and waives whatever benefit he might have under local law to treat the oral agreement as unenforceable. Hence, if there is an oral agreement, which the lessee is willing to be bound by, intending to, (and does) carry out and abide by, then the present Regulation is designed to require a disclosure thereof. Therefore, where he is giving effect to the oral agreement, he cannot fail to disclose it to the Secretary, and plead, in justification of such failure, the fact that under local law he is not bound thereby. On the other hand, if, because of local law he is not bound and he avails himself of local law to deny that he is bound by an oral agreement, and, the local court so holds, then, of course, he is not required, under the cited Regulation, to disclose the alleged oral agreement to the Secretary.

But even if § 3128.1 is found to be applicable to the Wallis lease, generally, and the interpretation thereof by the Solicitor is not accepted, but the interpretation advanced by Pan Am is accepted, as correct, nevertheless, the

Regulation, as so interpreted, would necessarily recognize that the Secretary considers a matter of this nature, as coming within the authority delegated to him, under § 32 of the Act. Being a matter which Congress has placed under the jurisdiction of the Secretary's regulatory authority, this grant of power to him necessarily precludes any grant of interstitial authority to the Courts. In the end, as in the beginning, we are back to the proposition that the policy in administering the Act, by the Secretary, has been to leave disputes between private individuals to local law and local forums, and to the extent that § 3128.1 may be applicable to the lease here in question, as well as the agreements here in question, that is a matter between Wallis and the Secretary and these plaintiffs have no right to champion the cause of the Secretary.

However, we repeat, that the Solicitor has placed the proper interpretation upon the Regulation in question, assuming its applicability, and such interpretation is contrary to that which Pan Am would now advance. It should be borne in mind that the Solocitor's memorandum was necessarily prepared in light of the views of the officials of the Department of the Interior and, unquestionably, expresses the views of these officials.

Pan Am's argument on page 34 to the middle of page 35, is best answered, by the fact that 45 years experience in the operation of the Leasing Act, and program thereunder, during which time Pan Am's "uniformity" has not existed, discloses none of the dire consequences that Pan Am envisions, and, indeed, "the business of the United States" has gone on, and thus conclusively demonstrating that it "may go on without (such) uniformity," all without a scintilla of damage thereto.

At page 36, Pan Am cites *Hood v. McGehee*, 237 U.S. 611, and the Court should note that in this argument

Pan Am is willing to concede that a federal lease is a "real right the situs of which is in (a) particular state," and thus subject to local law, for purposes of descent and distribution. Which, of course, is diametrically opposed to Pan Am's argument elsewhere. First, because Pan Am elsewhere refuses to acknowledge that a Federal lease is a real right, having a situs within a state, and, second, because Pan Am refuses to acknowledge that this real right is subject to local law in relation to the various other subdivisions of local law, in addition to descent and distribution. Nothing contained in *Hood*, denies the **power** of Congress to regulate the devolution of a Federal lease. If Congress has the **power** to regulate a transfer by contract, so does it have like **power** to regulate a transfer by intestacy and vice versa. The question in the case at bar is whether that **power** has been exercised by Congress, and Judge Wisdom points out, (and correctly so), that that which the majority below points to, as the exercise of such power by Congress, in the case of transfer by contract, is equally applicable to a transfer upon death. For the majority below made no distinction therein. In *Hood*, the Court said: "Alabama is the sole mistress of **Alabama land.**" Cf. *United States v. Burnison*, 339 U.S. 87 (1950).

5. ***"If The Court Holds That The Law of Louisiana Does Control, The Case Should Be Remanded For A Determination That The Writings In The Record Meet The Requirements Of Such State Law," McKenna, pp. 23-24.***

"Issues Asserted on Merits of the Case by Pan American but not passed upon by the Court of Appeals," Pan Am, pp. 37-48, also pp. 1-3.

The argument contained in the above referred to pages of McKenna's and Pan Am's briefs, are, in the main, directed at considering local law as it applies to the issues

herein. In actuality, we interpret these pages of the briefs as directed primarily at what decree should be entered by this Court, in the event it reverses the decision of the Court of Appeal.

In Wallis' original brief, as relief in the event this Court reversed the judgment of the Court of Appeal, he asked that the decision of the Court of Appeal be set aside and the judgment of the District Court made final. In doing so, he predicated it upon the provisions of 38 U.S.C. 2106:

> "§ 2106. Determination
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

If this Court concludes that the majority below was in error, and reverses its decision, then, unquestionably, this case is controlled by *Erie*, and local law is decisive.

As to the controlling effect that the applicability of local law would have upon the issues herein, it is noteworthy that, below, Circuit Judge Wisdom and District Judge Wright, both concluded that Wallis should have judgment. The other two Judges involved, Circuit Judge Rives and District Judge Bootle, **did not disagree.** Thus below, and on the question of the correct applicability of local law, at the most, it can only be said that the Judges are equally divided. Yet of these four Judges, only Judge Wisdom and Judge Wright had a background of training

and experience with, and in, the law of Louisiana, and, as noted, they held that local law was such that Wallis should have Judgment. In addition, and on the crucial question of the applicability of the local Statute of Frauds, it cannot be denied that under *Erie*, a Federal Court would be bound to apply and follow the decision by the Supreme Court of Louisiana, in *Hayes v. Muller, supra*, rendered while these cases were pending on appeal below, but considered and cited by Judge Wisdom in his dissent on rehearing (R. 117). A mere reading of this case, will conclusively demonstrate the correctness of Judge Wright's decision, which Judge Wisdom said was correct and should be affirmed.

We, therefore, submit that this Court should so consider the case, and, in reversing the Court below, reinstate the Judgment of Judge Wright, as final.

As Pan Am points out (p. 48), these cases have been pending for seven years. Additionally, the record shows that Wallis initially applied for the lease in question in 1956; that he was involved in litigation throughout the Department of the Interior, to and including an Appeal to the Secretary of the Interior, and, thereafter, into the Federal courts in Washington, D.C., to and including the denial therein of writs of certiorari by this Court. As Pan Am further points out (p. 8, fn. 4), the lease in question has been developed and is presently producing. Yet, because of this litigation, Wallis is denied the right to have, enjoy and utilize the proceeds from this production, which is presently being withheld, even though Wallis is clearly entitled thereto. Further delay will serve no useful purpose and this Court can properly make a final determination. These plaintiffs have had their day in Court and, we submit that, the proper decree to enter in the event

of a reversal of the Court of Appeal, is the reinstatement of the judgment of the District Court, as the final judgment herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, C. Ellis Henican, hereby certify that a copy of the foregoing Brief For Floyd A. Wallis, was served upon Counsel of Record, representing Respondent, Patrick A. McKenna, and, representing Respondent, Pan American Petroleum Corporation, and the Solicitor General, Department of Justice, Washington 25, D. C., by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record and the Solicitor General, at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this ..... day of February, 1966.

Counsel of Record for Petitioner.

ANNEX "A"—Analysis Of Authorities Cited By The Court In Support Of The Statement Quoted At Page 9 Of McKenna's Brief.

Of the authorities so cited by the Court, the first, *Gibson v. Chouteau*, has already been discussed in the body of this brief, *supra*, p. 11. *Sparks v. Pierce*, 115 U.S. 408, does not support the majority decision, but cites and follows the case of *Bohall v. Dilla*, *supra*. This case involved one who was claiming the land as mineral land, and the defendant was claiming that it was townsite land and thus subject to patent under the town-site law. The Land Department ruled that it was mineral land, and plaintiff was entitled to a patent, with a reservation of the surface for town-site purposes. This was reversed by the Commissioner, who concluded it was mineral land, subject only to mineral patent, and there was no authority to make reservation of the surface. The patent issued, and the Court held that for defendant to prevail in equity, he would have to "show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent." Here the defendant was not claiming equities, based upon a private transaction with the plaintiff therein.

Van Brocklin v. Tennessee, 117 U.S. 151. The inappropriateness of this decision to the case at bar is apparent from the mere statement of the question involved, by the Court, at page 153: "The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to Acts of Congress for the laying and collecting of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are

liable to be taxed, under authority of the State, **while so owned by the United States.**" We are not here concerned with local law operating directly upon Federal lands. The question here is whether local law regulates private contracts or transactions which purport, in turn, to relate to public lands, prior to the issuance of legal title thereto.

Widdicombe v. Childers, 124 U.S. 400. The facts appearing from footnote one of the majority opinion (R. 82), disclose why this case is not applicable herein. To a certain extent it is the converse of the case of *Williams v. U. S.*[1] Here the party asserting equities ***as against*** the patentee derived his rights (and equities) from the fact that he held under one who had dealt directly with the Land Department and he did not hold or claim under the patentee. Thus the plaintiff's ancestor in title had applied for the SE¼, but the register, by mistake, described it as SW¼. However, he and those under whom plaintiff claimed went into possession of the proper quarter section and the entry on the plat and tract books had been correctly made. Some 22 years later, without authority in law, the entry on the plat and tract books was changed, and thereafter, with full knowledge of the facts, Widdicombe made entry and obtained a patent. Here, as in *Williams, supra*, the patent had issued by mistake in the Land Office, but differently than in *Williams*, the plaintiff derived his equities directly from dealings with the Land Department, and did not claim **only** through private dealings with the only one—the patentee, who had dealt with the Land Department.

Felix v. Patrick, 145 U.S. 317. In this case Felix was an Indian, and, by treaty, was entitled to receive land scrip for land, which scrip had issued to her. How-

[1] The *Williams* case is discussed in detail at pages 54-56 of Wallis' Brief.

ever, the pertinent Act of Congress provided that "no transfer or conveyance of any of said certificates or scrip shall be valid." By fraud, Felix was induced to execute a blank power of attorney to locate the scrip, and a deed conveying land, but with the grantee and description of land in blank. These came into the hands of Patrick and he caused the scrip to be located with the name of William Ruth inserted in the power of attorney, and caused the deed to be completed by inserting his name as grantee and by also inserting the land description. Several years afterwards, Patrick secured a confirmatory grant from Congress. Later, upon the death of Felix, her heirs discovered the transaction, and sued to have it decreed that Patrick held the land in trust, charging Patrick with fraud and full knowledge of all facts. The case went upon a demurrer, and judgment was actually affirmed in favor of Patrick, based upon laches. Here you have the parties asserting equities, and basing their claim on scrip issued by the U. S., and (1) claiming fraud as respects the patentee, in being divested of the scrip, (2) asserting the prohibitory statute as respects the transfer of the scrip, and (3) alleging fraud in the procurement of the patent and the purported sale of the land. Clearly this case is not analogous to, or controlling of, the cases at bar.

The case of *U. S. v. Colorado Anthracite Co.*, 225 U.S. 219, involved the interpretation of an Act of Congress, and arose in the Court of Claims. One Stoiber entered land, furnishing false statements to the Land Office that the land was sought for himself and not others. Actually he was representing the plaintiff company. Another claim was made for the same land, and a hearing was had as respects the adverse claim, **at which hearing the true facts were disclosed.** The hearing resulted in favor of Stoiber, and he then received $3,200 from the company

to pay for the land, which money was paid to the Land Office. On appeal, the decision was reversed, and Stoiber's entry was ordered cancelled. This suit was by the company to recover the purchase price, under an Act of Congress, which provided that where an entry had been erroneously allowed and could not be confirmed, and was cancelled: "the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns" the money so paid. Thus the whole case revolved around the proper **interpretation of a Federal statute,** and the term "his * * * assigns." The Court said:

> " * * * But here there was something more than a mere quitclaim deed, executed in advance of the acquisition of any interest by the entryman. The entry was made at the instance of the company, with its money and for its benefit, and, unless the coal-land law forbade it, the entryman, by his voluntary action in that regard, became a trustee for the company, and charged with an obligation to convey the land to it. *Irvine v. Marshall*, 20 How. 558 ___; *Ducie v. Ford*, 138 U.S. 587, 592 ___; *Smithsonian Institution v. Meech*, 169 U.S., 406. * * * Not only so, but equity, which usually looks upon that as done which ought to have been done, would regard such a conveyance as actually made, and therefore treat the company as an assign. We speak of the view which equity would take of the matter, because it is manifest that the act of 1880 proceeds upon equitable principles and is intended to be administered accordingly. Like other highly remedial statutes, it should be interpreted with appropriate regard to the spirit which prompted it. And, when it is so interpreted, we think the term 'assigns' includes one in the company's situation, if only the arrangement between it and Stoiber was not forbidden by law." (p. 223.)

Here the Court was interpreting a Federal statute, in

light of equities, with no room for local law to apply, and it simply cited and followed the *Irvine* case. However, this was not concerned with a question of local law, but whether the Court wished to attribute equities to a private transaction just as the Land Department would have had the "power" to apply equitable considerations, had it actually involved a claim to the land, made prior to issuance of a patent. We submit this case is not controlling.

Bucher v. Bucher, 231 U. S. 157. The sole question here involved was whether lands acquired under the Homestead Laws of the United States and patent therefor issued to the husband would be community property of husband and his wife? The Court held it was, and that state law did not operate, **until the legal title had issued,** and hence this did not interfere with Federal interests. This case is obviously not controlling herein.

Ruddy v. Rossi, 248 U.S. 104, simply holds that where Congress **provided by statute** that lands upon the issuance of a patent shall not be liable for antecedent debts of the patentee, such provision is controlling. Here there was a specific Act of Congress made applicable, and perforce local law must give way. Such is not the case at bar.

We submit that the analysis of the cases cited in prior sections of this brief demonstrates that those analyzed in this section are not decisive of the issues here involved. As respects the majority opinion's reference to *73 C. J. S. Public Lands* § 209, due consideration was not given to the implications of subparagraph f. thereof, and particularly that part which states that "all evidence must be produced which would **be required in the general land office** for the issuance of a patent." As respects decisions by the Supreme Court of the United States, cited in support of the text, they are: *U. S. v. N. O. Pac. R. Co.*,

248 U.S. 507; *Independent Coal and Coke Co. v. U. S.*, 274 U.S. 640; *Utah v. U. S.*, 284 U.S. 534; *Holt v. Murphy*, 207 U.S. 407; *Great No. R. Co. v. Hower*, 236 U.S. 702; *Simmons v. Ogle*, 105 U.S. 271; and *Carr v. Fife*, 156 U.S. 494.

The *N. O. Pac. R. Co.* case, *supra*, is not relevant, for it related to a Federal statute concerning settlers on odd-numbered sections of land, as opposed to a grant of odd-numbered sections to the railroad company. The *Independent Coal and Coke Co.* case, *supra*, involved a suit by the U. S. to impose a trust on lands held by one who had **fraudulently induced** the lands to be transferred to the state of Utah, and then secured the legal title from the State of Utah. It is similar to *U. S. v. Williams*, *supra*, except the land was transferred by the U. S. as a result of fraud, rather than mistake, no private transactions were involved, and the U. S. cited and relied upon the *Williams* case.

The *Utah* case, *supra*, was merely a sequel to the *Coal and Coke Co.* case, where the U. S. was seeking a return of the lands from the State of Utah. The *Holt* case, *supra*, involved conflicting entries, where the senior entry was cancelled as a result of a waiver, and patent issued pursuant to the junior entry. The suit asserted fraud as to the execution of the waiver, pursuant to which the senior entry was cancelled. The *Great N. R. Co.* case, *supra*, was a contest resulting from a grant of land to a railroad, as opposed to a homestead entry made thereafter, but based upon a claimed settlement prior to the railroad selection, but it developed that the homesteader had not settled upon the land in question, but through mistake had settled on other land. The railroad prevailed. The *Simmons* case, *supra*, involved a conflict between different entries, and there was some evidence that there might have been a mistake

as to the senior entry, but it was not conclusive, and the patent prevailed.

As respects the reference to *42 Am. Jur., Public Lands*, § 37, the text contains this statement: "To charge the holder of the legal title to land under a patent as trustee of another, the claimant **must show himself** entitled to it and its refusal to him in consequence of errors **in the rulings of the Land Department** upon the law applicable to the facts found." Such is not the case here. As respects the Supreme Court cases cited, generally, to support the text, some of them have already been considered herein, and, as to others, in view of the foregoing statement from the text, and the further fact that after a review of these cases, it is our opinion that they neither add to nor detract from what has already been said, we, therefore, do not deem it necessary to review all of them in detail.

ANNEX "B"—Wallis' Reply to Pan Am's Charges of Fraud On the Part of Wallis, Based on Matters Beyond The Printed Record

Pan Am's effort to blacken Wallis' reputation is an unbelievable act of desperation that is founded upon its obvious realization that Pan Am actually has no position before this Court based on the issues upon which certiorari was granted.

If the Court will carefully examine the opinion of Honorable J. Skelly Wright, Trial Judge, it will find, at R 71, the following statement:

> "With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan American were both anxious to share in **any lease** Wallis might obtain over their lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties * * *."

These conclusions were reached by the Trial Judge after hearing all of the witnesses and upon considering all extrinsic evidence, including Sandel, house counsel and

principal witness for Pan Am, involving a direct conflict with the testimony of Wallis, and Judge Wright resolved this question of credibility in favor of Wallis and against Pan Am, as we shall point out more in detail hereafter.

Rule 9 of the Federal Rules of Civil Procedure requires: "In all averments of fraud * * *, the circumstances constituting fraud * * * shall be stated with particularity." Yet if the Court will examine the complaint (R. 32) of Pan Am, it will not find a single allegation with reference to "fraud" on the part of Wallis as respects the acquisition of lease BLM 042017, even of **a general nature,** much less with "particularity."

The Court will further observe from Pan Am's complaint, that, in bringing its suit, Pan Am (Article XI) relied upon what it characterized as being a **contemporaneous construction** of the option agreement, predicated upon an **alleged** conversation which Wallis supposedly had with Pan Am's house counsel, Sandel. Wallis denied any such conversation, and, the Trial Court resolved this conflict in testimony between Wallis and Sandel, **in Wallis' facor,** saying (R. 72): "But all the evidence, **including Sandel's own correspondence,** contradicts that assertion." Further examination of the other allegations of the complaint, will show that it was this nonexistent "contemporaneous construction" which serves as the predicate upon which Pan Am would now attempt to construct its charges of fraud.

Thus, in seeking to recover on its contract, Pan Am did so, depending upon the vehicle of false testimony, supplied by its house counsel. During the course of Sandel's testimony, Wallis forced the production from Sandel's files of a letter which completely destroyed Sandel's testimony and credibility. When the case was briefed before Judge Wright, Pan Am, **for the first time,** appreciated the de-

structive effect of Sandel's letter, upon Sandel's testimony. Thereupon, and for the first time, Pan Am abandoned its basis for recovery as reflected by the complaint, and, in frantic desperation, Pan Am commenced its charges and allegations of fraud on the part of Wallis.

Accordingly, Pan Am stands convicted of entering a court of equity and seeking the equitable remedy of specific performance, **based upon false testimony.**

However, there is another highly important aspect of the case, in light of which, Pan Am's charges of fraud should be examined. We refer to the allegations of Pan Am's complaint (R. 32). Pan Am **now** says that the filing of the application for the public lands lease by Wallis, with the **intent to keep the lease,** when issued, for himself, was fraud. Yet in Art. XII, in speaking of the filing of the application, Pan Am alleges Wallis' action "was in strict conformity with the obligations of Wallis" under the agreement. (R. 35).

Likewise Pan Am **now** asserts that Wallis did not take a definitive position before the Land Department,[1] that the land was "acquired lands," and, that this constituted "fraud" on Wallis' part. Yet in Art. XIX, in speaking of such failure to take a "definite position," Pan Am alleged that such failure of Wallis to take a "definitive position," conforming (conformed) strictly to his obligations under the option agreement * * * " (R. 37).

We earnestly ask the Court to consider the foregoing comparison, and then appraise Wallis' position in light thereof. Thus, we have Pan Am conceding and alleging that this action taken by Wallis, **was not only entirely**

[1] As we shall demonstrate hereafter, Wallis *did take* a definitive position in the Land Department, that the land was in fact "acquired lands."

proper, but precisely in accordance **with his obligations** under the option agreement. Yet when the Court construes the contract contrary to Pan Am's construction thereof, Pan Am says that such action by Wallis, **was improper and constituted fraud.** We ask the Court to view Wallis' predicament **at the time Wallis was initially confronted with the choice, or question, of whether or not he should take these actions which Pan Am NOW says were fraudulent.** If Wallis had accepted Pan Am's construction of the Agreement, Pan Am alleged that he was **obligated to do so** by the agreement, which necessarily requires the further conclusion, that if Wallis **had not** taken such actions, then he would have breached his obligation under the contract, and would have been liable to Pan Am for breach of contract. Is it not obvious that action taken under these circumstances (at Wallis' peril) could not possibly constitute fraud? We remind the Court that Pan Am was construing a contract which its own house counsel drafted and prepared. But let us pursue the matter further, suppose that, at the time, Wallis **had not** taken such action, assuming the risk of being held liable for failure to comply with the agreement. Pan Am does not get the lease, and neither does Wallis. If the Court then disagrees with Pan Am's construction of its own agreement, it holds Wallis was not obligated to take such action and, therefore, not liable to Pan Am for breach of the agreement. But still, **neither he nor Pan Am would have had the lease.** What then is the other side of the coin? If, when Wallis is confronted with the choice of whether or not, to take such action, and if he had construed the contract at that time (as he actually did and now does contrary to Pan Am's construction), then he was **not obligated under the option agreement,** and, not being so obligated, he was necessarily free to do so, and he would have received the lease free of claim by Pan Am. But he **does not get** that which

Pan Am would have otherwise gotten under the option agreement.

In light of this analysis, it is clear beyond question, that when Wallis took the action in question, and, pursued the course which he followed, his actions were entirely proper and it is impossible to characterize them as fraudulent. For, by such action, he made certain that the lease would be secured for one party to the agreement — entirely dependent upon whether, as a matter of law and under a proper construction of the agreement by the Court, Pan Am was, or was not, entitled thereto.

We repeat, that it is impossible, as a matter of law, to characterize Wallis' actions as fraudulent, and that no Court of Equity could condemn Wallis for acting as he did, when confronted with the situation which had developed. However, we shall examine Pan Am's charges further.

As respects the controversy within the Department of the Interior, between Wallis and Morgan, over their respective "acquired lands" applications, Pan Am alleged (Article XVII) that: "In the aforesaid controversy Wallis failed to take a definitive position on whether the lands applied for by him are of the one type or the other, i.e., whether acquired lands or public lands * * *" This allegation was proven to be absolutely false, for in his "protest" of Morgan's application, Wallis specifically alleged (Item 170 of Wallis' Note of Evidence, p. 3): "1. The lands in controversy are acquired lands of the United States * * * They are administered by the Corps of Engineers * * * Such lands are subject to leasing * * * in accordance with, and only in accordance with * * * the Mineral Leasing Act for Acquired Lands * * *" In support of this allegation, Wallis prosecuted his protest before the first administrative level, lost there, and appealed to the Director. It should be observed that the prosecution of this appeal, included a sup-

porting, and assertion, of the above allegation of the "protest" concerning the "character" of the land. Mastin White, Wallis' attorney, had prosecuted the appeal before the Director to completion, to the extent that White had filed all necessary briefs, and the matter was submitted to the Director for a decision prior to White's withdrawal, in November 1955, and the employment by Wallis of Mr. Harry Edelstein, a former Assistant Solicitor in the Department of the Interior, to take over the matter from White. It is true that the Director, by his decision of June 7, 1956, ruled adversely, as respects the appeal taken, proescuted and submitted by Mastin White on Wallis' behalf, and, the Director rejected White's contentions and assertions that the land was "acquired" and held that it was "public domain."

But the crucial factor to be noted, and which refutes all of Pan Am's claims of any improper action or inaction by Wallis, is the fact that Wallis **did take a definitive position** that the lands were "acquired" and Wallis prosecuted this on appeal to the Director where the adverse decision was finally made. The only question that remains is whether or not this appeal by White was adequately prosecuted. It necessarily goes without saying that in Mr. White's opinion he had done everything that was necessary in the prosecution thereof. Additionally, Mr. Harry Edelstein, upon his employment, reviewed the work that Mr. White had done, and he testified that in his opinion there was nothing further that he need do, or did,[2] in support of

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[2] Indeed, Pan Am stated to the Court of Appeal: "Edelstein confirmed (R. 564) that insofar as the 'acquired lands' applications were concerned there was then an appeal by Wallis from the refusal to recognize his acquired lands applications and from an order recognizing Morgan's acquired lands application and that until November 16, 1955 *Wallis had filed all the necessary documents in support of the appeal,* a brief on appeal, and the reply, and in the opinion of Edelstein what had been done was adequate * * * " p. 34, "Original Brief on Appeal on Behalf of Pan American Petroleum Corp. 5th Circuit, Court of Appeal."

the pending appeal. Consequently we find his approval as to the adequacy of White's prosecution of the case, and, more particularly the contention that the land was "acquired." But we do not have to rest solely on the opinions of Mr. White and Mr. Edelstein, **for we find that Pan Am likewise approved, as to the adequacy and sufficiency, of what was done on Wallis' behalf, in asserting that he land was "acquired."**

In confirmation of this last statement, we direct the Court's attention to the following irrefutable facts, viz:

1. Mr. Neil Stull, who was Pan Am's Washington attorney and expert on Department matters, wrote a letter to Pan Am (quoted at page 10 of Wallis Petition for Certiorari, fn. 15), and in this letter he advised that he had actually collaborated with Mr. White and had been "permitted * * * to participate in the handling of the case." He further stated that he had "very carefully" reviewed the brief which Mr. White had submitted to the Director and that he did not "believe that it can be improved upon * * * (and it) meets with my complete approval. **I do not believe that I could raise any points which have not been raised by Mr. White** * * *" Here then is Pan Am's own expert on Department of Interior matters, unqualifiedly approving the assertion and prosecution by Wallis, including all that was being said and done by Wallis in an effort to have the character of the land determined to be "acquired" land, and Mr. Stull said it could not be "improved upon."

2. At about the time the matter was being submitted to the Director on appeal, Wallis discussed the question of the character of the land with Sandel, Pan Am's attorney and house counsel, and Sandel prepared a memorandum in November of 1955 (Original Exhibit, Sandel

X-4), in which Sandel stated that he had examined the question as to the character of the land, and he set forth in detail his views as to why the land was "acquired." If the Court will take this memorandum and compare it with what is disclosed in the Director's opinion of June 7, 1956,[3] it will see that there was absolutely nothing contained therein which was not before, and considered by, the Director at the time of his ruling upon the character of the land.

3. In addition to the foregoing, and more important still, we find this highly significant admission made by Pan Am in its brief, at page 3-4, to-wit: "Pan American's attorneys were cognizant of the form and status of the Wallis acquired lands applications **and approved the actions of Wallis until** ABOUT AUGUST 1965 * * *"[4] This is necessarily predicated upon the letter of Mr. Mr. Stull, above referred to, and, therefore, shows that Pan Am admits that Wallis had properly prosecuted his position before the Director that the lands were, in fact, "acquired."

In light of the foregoing, and more particularly the highly destructive admission which Pan Am is forced to make, because of Stull's letter, it is impossible for Pan Am to now contend that Wallis did not adequately prosecute and maintain his "acquired lands" applications, and, more particularly, that he did not assert the character of the land to be "acquired."

And while Pan Am did attempt to complain and criti-

[3] Pan Am quotes this decision at page 6 of its brief, referring to it as "Pan Am's Or. Ex. C-6." Furthermore, this is the same decision we referred to, in connection with the discussion of McKenna's brief, *supra*, p. 10, fn. 3, and we have deposited a copy thereof with the Clerk, for the Court's convenience.

[4] This highly damaging admission by Pan Am was characterized in the court below as follows: "It is admitted by Pan Am that Wallis acted properly * * * until in late 1955 or early 1956 * * * ," P-23, "Original Brief On Behalf of Pan American Petroleum Corporation," Fifth Circuit Court of Appeal.

cize Wallis because of what he did not do after the adverse decision by the Director, to this very date and throughout the trial of this case Pan Am has never produced one single witness, or, one shred of evidence, relating to the question of the character of the land, which had not already been submitted to the Director and considered by the Director in his decision. "Diligence in law means doing everything reasonable, and not everything possible." *Cameron v. Lane*, 36 La.Ann. 716.

Despite the foregoing, the reported decision of the Secretary of the Interior of August 27, 1958, to which Pan Am refers in Article XVI of its complaint (R. 36), as reported at 65 I.D. No. 9, shows that Wallis did, in fact, appeal the decision of the Director, to the Secretary of the Interior, insofar as his "acquired" lands lease-offers were concerned, despite the effort on the part of Pan Am to make it appear that he did not do so, when Pan Am (bottom of page 7) only quotes an extract from the "findings of fact" by United States District Judge Hart. For Judge Hart also found as a fact that, "On February 6, 1958 Wallis also asked the Secretary to exercise his supervisory authority over the rejection of his acquired lands offers. The Secretary granted the request for exercise of his supervisory authority and considered the questions provided by those requests * * *"

At page 4 of its brief, Pan Am acknowledges that the lease actually issued to Wallis on December 19, 1958. Accordingly, under the option agreement (R. 40) with Pan Am, any rights which Pan Am had to the lease, as issued, were crystalized **at that time.** The lease then belonged to Wallis, or, Pan Am was entitled to it. Because of this fact, whatever Wallis did theerafter, and more particularly in the suit field by Morgan in the District Court against the

Secretary of the Interior (referred to on page 7 of Pan Am's brief), had no bearing on the option agreement or Pan Am's rights thereunder, for either Wallis had performed, or, the matter was of no concern to Pan Am since it had no interest. Such being the case, Pan Am's comments concerning the Morgan suit are entirely irrelevant. However, in this connection, we point out, for the Court's information, that Pan Am intervened in that suit on the side of the Secretary and Wallis, alleging "Wallis' defense and that of the defendant Seaton and also that of Pan American Petroleum Corporation presenting essentially identical questions of law and fact." Item No. 163 of Wallis' Note of Evidence.

While the matters discussed in Annex "B" are not germane to the issue before the Court, as presented by this appeal, we have felt constrained to submit the foregoing **only** because Pan Am has gone beyond the printed record, contrary to the Rules of this Court, in trying to discredit Wallis. It is submitted that the foregoing completely refutes the baseless charges of Pan Am.